

SMITHFIELD INQUIRY

CLOSING SUBMISSIONS FOR ENGLISH HERITAGE

A:Introduction

1. Our heritage of historic buildings and townscape is worth protecting for itself. It contributes to individual and collective quality of life. It also makes an important contribution to the social cohesion and economic prosperity of the community. It reminds us of where we have come from and how we reached here. It recalls past struggles we have shared and reminds us of obligations we owe to each other for the future. It can reinforce our sense of values and impress upon us that we should not take for granted what we enjoy today. An appreciation of past achievements may engender both a determined ambition to emulate them in substance and a sense of apt humility about our own talents and their limitations. The contribution of our cultural heritage to our environment enhances the attractions of our country to potential external investors and reduces the propensity of talented people to emigrate.

2. Today is the anniversary of the death of Winston Churchill. Few will doubt that WWII was a period in which the noblest virtues were demonstrated by the British people for the most worthy of causes—none more so than the people of London. It is ironic, but perhaps not surprising, that those who seek the demolition of the GMB include among their arguments that the NW corner reveals that it was rebuilt as a result of bomb damage. That damage does not prevent us from enjoying the surviving larger part of Horace Jones building. But it does provide a reminder of the British people's 'finest hour'.

B:Heritage Policy:

1. There is little dispute that these buildings make a positive contribution to the CA. You have indicated that you do not intend to take a view on whether the Red House is of national importance. So far as you are concerned the RH has been so designated by the SSMCS.
2. Mr Mascall's evidence is succinct and need not be repeated. It demonstrates convincingly both that there is a presumption in favour of retaining the GMB and that any attempt to seek its demolition should have been preceded by offering a freehold or long leasehold on the open market. I commend it to you as the starting point of your deliberations.
3. The disagreement between Mr Mascall and others about the PM canopy is unimportant. Even if it were desirable to remove it that would not require or justify the demolition of the GMB.
4. Professor Tavernor's view that the GMB does not make a positive contribution is eccentric. None of the other witnesses of the two promoters of this scheme (TPL and the City) agree with him. The City takes the view that the boundaries of its CAs are so tightly drawn that it is unnecessary to identify which individual buildings make a positive contribution as they all do. Its witnesses do not think that this building is an exception to that general principle.
5. You and the SoS will have to take a view on the effect of what is proposed on the Annex and RH. Further reiteration by me now of the powerful analysis by Mr Mascall will not help you. I

commend it to you. Unacceptable damage would be done by KPF2.

6. The applicants took the same view as EH as to the need for consent for works amounting to substantial demolition of the GMB Annex . *Shimuzu* (CD 29.7) HL makes it clear that it is not only total demolition of every part which constitutes demolition and requires consent. The HL decision was by a narrow majority of 3/2 . Lord Griffiths dissented. Lord Cooke of Thorndon agreed with the result for different reasons from the majority.
7. The essence of the majority approach was (1) that the whole of the building, not merely part, had to be considered when deciding whether demolition was involved (2) that the key was whether the works would create a site for redevelopment (3) that the test was whether there was substantial, not total, demolition and that (4) that was a question of fact and degree.
8. It is important to remember that what the HL actually decided was that removal of chimney breasts of a building did not constitute demolition when the building as a whole was considered. What is proposed here is quite different. Considering the Annex as a whole there would be substantial demolition creating a site for redevelopment. Lord Hope of Craighead, with whom the other members of the majority agreed, endorsed what Lord Justice Millett had said in the Court of Appeal (QUOTES).
9. The question may be put in this way. Is what would be there after completion of KPF2 the same building, but altered, or a new building incorporating parts of the old building? The answer must be the former

10. Even if it is otherwise right to do so permission should not be granted for the demolition of buildings which make a positive contribution to a CA until secure arrangements are in place for their replacement by acceptable replacements. It would as Mr Dodds explained make no sense for PPG 15 to, nor does it, exclude from this protection the sites of demolished but unlisted buildings in CAs. First empty gap sites are unacceptable in CAs whether or not the previous building was listed. Second the need to ensure that what replaces demolished buildings preserves and enhances the CA character applies whether or not the original building was itself listed.

KPF2 Scheme

11. The KPF2 scheme is inappropriate for, and unworthy of, its location both in use and appearance. I will deal with the latter first.
12. The GMB and Annex are at a critical location. They form part of the setting of the Victorian Holborn Viaduct and its delightful bridge. They are the gateway to the Smithfield area both from the otherwise depressing F St and from the HV bridge to the S. They make an important statement about what would otherwise be hidden from the thousands who pass daily along F St and HV.
13. The proponents of KPF 2 claim that it is in the Victorian tradition of engineering structures. They revealingly cite the Forth Rail Bridge as a precedent. This assertion and the expressed heavy metal trusses of KPF2 reveal a fundamental misunderstanding of the Victorian structures of this area. Here as, at Tower Bridge, Horace Jones used discreet engineering. The heavy metal was clothed. Even the HV bridge seeks a

lightness and flowing liquidity in its visible metal. This building does not. The affected machismo of the expressed trusses is alien to the spirit of the Victorian architecture of this area. Horace Jones achieves an integrated transport design in which the presence of the railway is unnoticed by the passerby. TPL's architect did not even seem to appreciate that the bridge was only part of the Holborn viaduct, so discreet is the Victorian engineering, and so little the understanding of it by KPF2's architects.

14. The other surface features of KPF2 are too busy. Individually and collectively they are stressful. Whether the building is reminiscent of something else such as a Dubai building or a 1960's Northern bus station matters not. It doesn't work.
15. Sir Terry Farrell's criticisms were powerful. The building does not respect the low lying and low rise buildings of the Smithfield. It is of too large a scale. As he explained, of course, scale is not the same as size. The fact that a distinguished architect with a serious practice such as his was prepared to stick his head above the parapet and criticize a fellow architect's scheme is significant.
16. As Sir Terry pointed out, CABE's criticisms, even after resubmission, were expressed with restraint but nonetheless ones which he would have regarded as devastating.
17. Sir Terry is not alone in his criticisms. I shall not repeat the powerful evidence by SAVE and others.

Importance of Marketing:

18. PPG 15 3.19 (ii) makes it clear that before demolition is permitted *real efforts* should have been made to find a compatible use and that this should include offering the building on the open market. Generally this should involve the offer to the open market of an unrestricted freehold at a realistic price reflecting the building's condition. In this case the City's obligation to maintain the railway lids may well make appropriate the offer of a long leasehold (rather than unrestricted freehold) with provisions enabling the City to fulfil its obligations. Neither have been offered.
19. The City reluctantly produced a record of the inquiries and related correspondence from interested parties who were seeking to acquire or lease the whole or part of the Western Market Buildings. Mr Bennett conceded orally that the City '*had been inundated*' with interest.
20. There are before the Inquiry significant expressions of interest by serious commercial organizations. These have emerged both before and during the Inquiry. They are to be found not only in the appendices to the evidence of Mr Reynolds and SAVE, but also in letters sent independently to the Inquiry. They come from near and far. These include Matterhorn Capital a substantial property development company, the owner of nearby Smith's Restaurant, Mr Munnings and the owner of the nearby nightclub Fabric. Mr Reynolds himself, of Urban Space Management, is interested. He was invited by the City to express interest in the potential for market and related uses. In remarkable failure to appreciate what this Inquiry is about Mr Kut thought that this disbarred Mr Reynolds from giving useful evidence.
21. The City has been so far removed from complying with Government and local heritage policy that it did not even

make a substantive response to their invitee Mr Reynolds ' suggestions. Other expressions of interest from a variety of sources over several years received a summary brush off.

22. This is far from a case in which it can be said that there is clear and convincing evidence that all reasonable efforts have been made to find new uses for the building. There is, in fact, clear and convincing evidence of the opposite. It is not only the neglect of the building and the failure to market it. It is also such documents as the 2002 secret report AW SBH 5/C App BB. They reveal a determination to withhold from the open market and do a secret demolition deal even at a time when the advice it was receiving was to the effect the reuse without demolition would be viable even if the railway lid costs were borne by the WMB.
23. It is wrong in any case to suggest that the railway lid repair costs must be borne by future WMB users. The city has a statutory and contractual obligation to maintain the lids regardless of whether it gains permission for demolition and redevelopment (Mr Rees CLC/3/A [2.3.15] ,CLC 9, CD 29.2 and 3). It cannot escape from this. It has had the revenue from the WMB for over a century. It should have had a sinking fund. It also has a substantial estate in the vicinity which should be viewed as a whole and would benefit from the regeneration of the area.
24. In assessing the potential for further use of the WMB the cost of works to the railway lids should be disregarded. As it happens, however, it may very well be that uses of the kind that Mr Reynolds and others have suggested would generate enough money to pay for repairs to the lids. But that would be a bonus. It is not a necessity.

25. The only real test of the viability of further use of the WMB is the test of the market. The City has deliberately chosen not to put it to this test. That is because it knows that the outcome would be adverse to its aspirations to demolish and develop the site to maximize financial returns to itself.
26. A dramatic demonstration of the difference between academic valuation theory and market realities is the difference between the figure of £2.4M given by Mr Kut for the underground car park and the £12M actually paid for it in the market. No doubt it will be said that there are special circumstances which it would not be right to take into account in a valuation. It is because the real world is full of such special circumstances that Government policy expects offers to be made on the open market.
27. Insofar as the suggestion that the £12M represents hope value it should not be assumed that that is exclusively directed towards a demolition development. Many operators of businesses other than car parks are likely to be interested in the basement. They may have approached, or been approached by, Thornfield or NCP. Any hope value may represent hope value for the sort of project which could be incorporated within the basement of the retained building.
28. A hypothetical valuation exercise is no substitute for genuine open market testing. EH does not therefore accept that the potential for reuse should be determined by valuation exercises.
29. The valuation exercise undertaken by Mr Kut does however reveal that the massive capital investment required for the KPF2 commercial office development would not be viable. Mr Kut's method has some validity for such a

development. Over £230,000,000 (TPL5/C Scenario 5 p2) would have to be expended before any return could be anticipated. It is a conventional 'grey day' development to be undertaken by a developer who clearly would have to borrow funds from a bank or other institutional source. *Such* bodies are likely in assessing the acceptability of risks on *such* a project undertaken by *this developer* (see App BB REF) to attach importance to Mr Kut's valuation.

30. It was only just viable on their analysis in June 2007 and then only if TPL had a 60% prelet. (KUT TPL/5/A [9.26], [8.36]-[8.40] and XX). Mr Kut, however, described the prospect of a pre let in these terms

'In practice it is highly unlikely that this would be achievable....'

31. The examples of achieved long range pre lets were in different market conditions. The St Alphage development is quite different from this. First it is in the centre, not the fringe, of the City. Second it is for a much larger size building (1M ft²). Such buildings are rare and therefore there is a need for a potential occupier to pre lease.
32. Since then the US sub prime mortgage crisis has crossed the Atlantic and the Northern Rock collapse has occurred. The market has moved a long way downwards since then. Mr Kut did not see fit to alter his evidence to reflect this or even to draw it to the Inquiry's attention.

33. Respected practitioners have suggested that values have dropped by 10% since last June.(see DHT EH/7/C [2.2-2.3] and EH/7/D) . A slip of yields from 5% to 5.5% has been suggested by Drivers Jonas (EH/7 /C [2.5]). If yields were to slip by even as little as 0.125% then the return to developer would sink below the 20% level said by Mr Kut to be required (EH/7/C [3.3-3.4]; and Kut TPL/5/A [4.12] 20-25%)
34. .Mr Kut's attempt to get round this by suggesting that rent levels should be assumed to increase does him no credit. His explanation for taking the June 2007 valuation date in the first place was equally unconvincing. Just as he failed to disclose the £12M transaction, he sought to present his material on a basis that enabled him to ignore present realities in the market.
35. Thornfield cannot even claim to have lined up the necessary finance. Neither Mr Kut nor anyone else was able despite many weeks since the question was put to produce any evidence that the company has any more assets than reported in the Report of 2002 to the City (AW SBH/5/C AppBB [69](iii)), which suggested that it should not be financially trusted. The remarkable feature of the Bank of Scotland documents is that so many attempts have been made to obtain supporting material from them and to so little avail. They have not offered any money for this project, still less committed themselves to provide it.
36. There is a further problem in that NR may yet decide to seek a slice of the action and exploit the potential for ransom and obvious attractions of a £230M scheme. This would make the project even less attractive to a developer.

37. An additional problem is the effect on the capital value of the developer's interest of the reduction in annual revenue caused by the obligation to pay ground rent to the City. This was anticipated to be a minimum of £545,000 but ranging to a figure in excess of £1M pa *even on 2002 rental levels* (SBH/5/C App BB [18] and [63] (and Kut XX'd Tues 22nd January). This obligation would reduce the attractiveness to Thornfield even further. The capital value of the City's interest (which would correspond to the reduction in the capital value of the developer's interest) was *even on 2002 rental levels even on 2002 rental levels* £16,773,000 (SBH/5/C App BB [62])
38. CD 7.5 which contains parts of the development agreement between the City and Thornfield does not reveal what the ground rent to the City will be. Schedule 2 of the relevant (Annex G) lease template which sets out the basis for the ground rent has been blanked out.
39. The analysis of Mr Kut would not therefore correspond with how Thornfield would approach the decision as to whether or not to proceed with KPF 2.
40. There has now been revealed to be a yet further problem. Whatever the implications for an academic valuation exercise the £12M would be highly influential on decision makers within the Thornfield Group and their potential financial backers.
41. They would certainly want their 20% profit (TPL/5/A [4.12] to reflect that additional expenditure. If the £12M plus interest from 2007 is deducted even from the surplus of £416K of the June 2007/ 60% pre let assessment (which itself disregards the

City's ground rent) then there is likely to be a strong pressure towards not throwing good money after bad and bailing out. That pressure will be even greater if allowance is made for the crash in commercial property values and adjustment in yields. They are both unlikely to wish to proceed with the permitted development on the basis that good money should not be thrown after bad and likely to use this as pressure on the planning system to alter the permission to increase potential revenue, for example, to increase the size and floorspace of the development.

42. It is remarkable that no one from the company or elsewhere has been called to give evidence about Thornfield's ability and willingness to undertake KPF2. The submissions that are made about this matter were clearly flagged up last year.
43. Mr Capocci was present during Mr Kut's evidence on Tuesday 22nd January (as he was during Mr Kut's earlier evidence and much of the Inquiry). He was not called to explain how the Inquiry had not been informed of this material circumstance. Thornfields' legal representatives were evidently aware of the November 2nd sale transaction before Ms Burgess of EH discovered it; they removed NCP from the draft s106 Agreement. The City had carried out a search on December 31st; it was therefore aware both of the fact and amount of the transaction.
44. The transaction was obviously a circumstance material both to the viability and likelihood of reuse of the undemolished building (the issue to which valuation evidence was directed) and to the likelihood of KPF2 actually being constructed (an issue in a CA, flagged up last year by EH and SAVE). The failure

to disclose this information by the promoters of this scheme, whatever the reason, suggests that the remainder of their case should be treated with great caution. If they really did not think it material then their judgment is manifestly defective and they should not be trusted for that reason.

45. There is a further reason why Mr Kut had a duty to inform himself of this transaction and then to have revealed it to the Inquiry. He was clearly and unambiguously alerted to the existence of a sum of £12M which should have been investigated by him when he was XX'd by me in November (after the transaction had been completed). The £12M might indicate that the NCP figures gave a false impression of the value of the car park use as such. Mr Kut treated the NCP figures as the best the market could do. They may not have given a true impression of car park values; Mr Kut did not have any independent basis for assessing their reliability of the open market value of a car park. NCP certainly had a financial interest (from their contract with Thornfield) in the obtaining of permission and the amount and cost of affordable housing and other potential planning obligations. They may have felt they had an interest in reducing the perception of the value of the car park for those as well as ordinary reasons relating to their general bargaining position with landowners. A minimum sale price of £12M had already been agreed and incorporated into the NCP agreement. The £2.4M perhaps also reflects the obligation on Thornfield to offer NCP a right to operate any future car park (TPL/5/BB [12.1—12.6]). NCP would naturally have an incentive to minimize the impression of the amount of their revenue so that the figure included in Thornfields' obligatory offer of a lease under Clause 12.2 on any car park would tend to be minimized.

46. Whatever view Mr Kut and the promoters' lawyers took of the likely significance of the £12M transaction its existence should have been investigated by Mr Kut. It should have been disclosed both by Mr Kut and the promoters' legal representatives, who must have known of it before Ms Burgess' discovery, as they removed NCP from the parties to the draft 106 Agreement. Others could then have formed their own view and presented evidence and make submissions on an informed basis. It was an actual market transaction involving the sale of part of the site.

Potential for Reuse

47. Schemes to refurbish and reuse, rather than demolish, the WMB are inherently better able to withstand the vicissitudes of the present commercial property market, as Mr Lerner correctly observed.

48. KFR are not, as they expressly acknowledged in their report, experts in markets. EH has therefore turned to Mr Reynolds who is an expert. His expertise was effectively acknowledged by the City's invitation to assess the potential of the market.

49. Mr Reynolds has presented to the Inquiry various assessments of cash flow and expenditure. These demonstrate the greater robustness of the reuse scenario. First the amount of initial expenditure is much less than with demolition and 'grey day' office development. Second operators of businesses are likely to wish to participate in financing the operation. They have a primary return in their ability to run their businesses. Third

cash starts to flow in from an early stage. Fourth such schemes are by their nature flexible and responsive to evolving circumstances.

50. The various documents produced by Mr Reynolds demonstrate that such an enterprise is likely to be attractive to those who would carry it out. But it must be remembered that this is an inquiry into KPF2, not into Mr Reynolds ideas. He does not, of course, put forward a particular scheme. He illustrates one of the sorts of schemes which could work and should therefore be given the chance that offering the site on the open market would provided.

51. Mr Reynolds takes three scenarios. The first is a conservative, pessimistic scenario (Illustration 1). The third is an optimistic one (Illustration 3). I propose therefore to focus on the middle scenario (Illustration 2). This is based on Grimley's rental level of £25ft² for the F St and Annex retail units, but Greenwich market levels for GMB internal units (£60 ft²) and stalls. The Greenwich levels are what has in practice been achieved at Greenwich (see the last page Appendix of EGR 7 /EH 3D for G stalls and EH 3/0 for internal units @£70 and £65ft²). The office rental levels are conservative (see EH/3/J pp2&3 and EH/3/R and Mr Lerner's examples)

52. Smithfield as a location for market, retail and A3 activities is much more attractive than Greenwich. It not only enjoys close proximity to the massive tourist attraction of St Paul's, but it also enjoys close proximity to the high earners of the City and legal Holborn. It is on the way to and from work for thousands via F station. That station makes it accessible for leisure and shopping trips via Thameslink (even before Crossrail) to a large

part of SE England with frequent 24 hour services proposed. There are bus stops directly serving many prosperous areas. There are 3 underground lines and several stations nearby. There is substantial car parking not only on street at the weekends, but also under both the Meat Market and (currently) the WMB. The Meat Market usage by meat market workers (night and early morning) complements usage by many of the visitors to the attractions of refurbished WMB (midday, afternoon and evening). There is a growing prosperous hinterland of wealthy city centre dwellers. The intense pressure at Borough Market demonstrates the enormous potential for new markets. Mr George Nicholson's letter is telling.

53. He has been cautious in attributing low values to the basement. The recently disclosed ownership of the car park by the applicant means that the market offer should include that area. That would create a very attractive and potentially extremely lucrative opportunity for entrepreneurs, whether individual or a consortium, of the WMB. Insofar as the £12M represents hope value it should not be assumed that that is exclusively directed towards a demolition development. Many operators of businesses other than car parks are likely to be interested in the basement. They may have approached, or been approached by, Thornfield or NCP. Any hope value may represent hope value for the sort of project which could be incorporated within the basement of the retained building. Thus the £2.4 M is likely to be a serious underestimate.

54. The loss of car parking immediately beneath the building would not deprive the WMB of either the current off peak and

weekend on street parking and the enormous car park beneath the meat market. Meat traders hours of use dovetail well with the hours when retail, A3 and leisure users would wish to park while visiting the WMB. Even office use would not be in competition with evening and weekend use. It is in the evening and weekends that Londoners contemplate the use of their cars. The WMB would continue to have a greater attractiveness than Borough Market, Spitalfields, and Greenwich and such places in this respect. Greater usage of the meat market car park could only increase City revenues.

55. The SMTA offer no environmental health evidence to justify their opposition to food stalls. Neither the City nor Thornfield share their view. Their principal concern, to safeguard the meat market, would not be jeopardized by the retention and reuse of the WMB.

56. Even if one takes Mr Cameron's suggested methodology (CLC5/D) the project would in Mr Reynolds Illustration 2 scenario produce, if sold after 5 years, a surplus of more than £11.6M for distribution without developer's profit (EH/3/T [2A]). Even after a return to investors of 5% pa and 25% after 5 years there would be more than £10.7 M for distribution (EH/3/T [2B]). Even after a developer's profit of 20% had been taken there would remain more than £6.1 M for distribution (EH/3/T[2D]).

57. The above assessments assume that the project pays for £18.6M of repair works (as well as fit out costs) . It is questionable whether after so much neglect it is reasonable to

expect future users to pay for the remediation of this past neglect.

58. The above assessments do not include any sum for the NCP area (not even £2.4M). (The rent of £3,312,332 in EH/3/T is the same figure as that in EH/3/G which appears before Mr Kut's NCP figure of £2.4M is there added) So a sum should be added for that area.

59. The above assessments are on Mr Cameron's approach for the City. If Mr Reynolds own approach were taken then the amount for distribution after paying back finance and investors would be £27,525 M (at 7% yield and including £2.4M for the NCP area)

60. Nor should the potential of publicly funded organizations to take on the WMB be ignored, as Mr Tomback explained in oral evidence.

C:Development Plan Policies:

1.National policy attaches importance to plan led decision making. There is a presumption in law that the decision should be made in accordance with the statutory development plan (P&CPA 2004 s38(6)). The statutory development plan consists of the UDP and the London Plan. In cases of conflict the latter, being later, prevails.

2. The proposals are in conflict with conservation policies of the London Plan (4B.10,11 and 12)(EH/6/A [10.1]). They are also in conflict with the conservation policies of the UDP (STR 10A,STR 10 B, ENV 4,11,17 and 18)(EH/6/A [10.20]). Mr Rees concedes that there is a conflict with ENV 11 (CLC/3/A [4.12.31])

3. Are the proposed *uses* in accordance with the development plan? No. The proposed composition of uses is in fundamental conflict with the development plan. The scheme is for a '*primarily..... commercial office building*' (TPL/3/A[6.2.71]) .It is for offices of the large plate, 'grey day' type (DHT). The proportion and type of office use is not in accordance with the character of the Smithfield area which the UDP identifies and seeks to protect (ECON 6 CD 20.1).

4. The site is within the CAZ and involves an increase in office use. The London Plan (3B.4 CD 19.1p 90) therefore requires both a mixture of uses and that housing be included within the mix of uses on site. No housing is included within the scheme. The scheme fails to comply.

5The importance of the *maximum* increase in housing provision is emphasized many times in the London Plan (eg 3A.1 (p 54), 3A.8 (p65), 5B.1 (p227), 5C.1 (p242) CD19.1).

6.The promoters, recognizing the fundamental difficulty that this presents, made feeble and unconvincing attempts to justify its omission. Mr Simmonds, for example, sought for example to suggest that housing was merely a possible rather than a required element of the mix. The repeated references to it were, he insisted, merely to make clear that it was not precluded within the CAZ.

7. This argument lacks credibility and smacks of desperation. First the policy itself speaks of a mix '*including housing*'. Second the supporting text speaks of the '*relevant proportion of housing*'. Third para 3.124 (p92) expressly states that the mix '*shall include housing*'. The use of such a mandatory auxiliary as '*shall*' makes the meaning of the policy clear beyond peradventure of doubt.

8.The permissible exceptions to 3B.4 are very limited and do not apply here. This is not surprising in view of the emphasis in the Plan on the maximization of housing provision. Naturally a fundamental conflict with strategic policy objectives would justify a departure. But

that conflict must be *demonstrable* (see SRDF CD 19.6 [158]). Mere invocation of the principle or assertion is not enough.

9 An exception may apply to '*parts*' of the City. It follows that it does not apply to the whole of the City. If it applied to this city fringe area it is difficult to see how it could fail to apply to any part of the City (MD Key Points EH/6/C [3.2]). It is noteworthy that the Mayor did not consider that this area was one of those parts of the City where housing would conflict with strategic policy objectives. He expressed regret both at the absence of housing on site and the small amount of affordable housing contribution (CD 27.1 p1 third para)

10. Housing contributes to economic growth (3.124 p 91 CD 19.1). The provision of housing on the City fringes contributes to the City's attractions as an important financial centre within the World City of London (which, of course, notwithstanding parochial rivalries is not limited to the City but includes other areas such as Docklands).

11. True it is that the site is within the Smithfield/Farringdon Area of Intensification. But the strategic policy applicable (5B.5) to the area encourages the provision of housing. The SRDF (CD 19.6) goes further and expressly requires a *minimum* amount of housing.

12. Mr Rees sought to suggest that the area was unsuitable for housing. He suggested both that there were inadequate services for housing and that the level of amenity would be unacceptable. Both arguments fly in the face of his own authority's UDP (see [2.31] line 7 CD 20.1)) and recent draft Core Strategy (EH/6/D [2.35]) and the evidence of the real world housing market. The City's own planning documents identifies this as an area where services are available and housing should be provided. A walk from the site across Charterhouse and along Farringdon Street to the F station passes a wealth of shopping and services which would be the envy of most

(MD EH/6/E)). These include both a Sainsburys, fresh meat and vegetable specialists and 24 hour shopping.

13. The UDP does not suggest that the meat market precludes housing in its vicinity for reasons of amenity or any other reason. The Smithfield specific policy ECON 6 encourages it. The market specific policy ECON 8 does not suggest that housing must be excluded from its vicinity. The redevelopment of a site with a new building enables the inclusion within the design of any desired level of acoustic insulation to avoid disturbance from market vehicles.

14. The fact that there have been complaints about noise from vehicles is neither surprising nor a cause for departure from the policy. They have not prevented the market from thriving. Environmental health officers and the law expect people to accept the established character of an area into which they move. Nonetheless, of course, as Mr Dodds observed, people will still always make complaints. There are complaints up and down the country especially in town centres and places such as Soho and Covent Garden. The CAZ, which is the area to which 3B.4 applies, is indeed one which by its nature is bound to attract complaints about many of its activities from residents. Yet it is nonetheless an area in which housing is required as a matter of policy. Housing in the CAZ not only provides accommodation for London, but also important support to commercial office activity and constitutes an essential element in the London Plan's vision of a contemporary city centre.

15. Market evidence (EH/6/F) (note especially title page, 5th page top, 6th page 2nd property, and 7th page bottom property) demonstrates that people value highly the opportunity to live in this area. Thus accommodation is marketed as '*Market View*'. Mr Rees invoked Farringdon Street noise as a justification for treating the residential environment as unacceptably low. Yet the market takes a different view here and throughout London.

16 Mr Rees sought to suggest that there would be inadequate space for any residential element within the scheme. First: if that were so it would be a fundamental defect in a design for a site within the CAZ. Second: if a building of this size (44,000m²) could not find the space for separate lift for a residential element it is difficult to see that any scheme could in reality do so. Third: this building has been designed in a way which reveals much unused space. There is a huge atrium. The argument has no persuasive force. This argument simply confirms that Mr Rees doesn't like 3B.4.

16 The preservation and reuse of historic buildings would justify a departure from the 3B.4 requirement for housing (although it may well be that it could be incorporated in an reuse scheme)

17. There is no basis for suggesting that the need for office space overrides 3B.4. (see EH/6/A [11.12]) There will, regardless of KPF2, be an adequate supply when these offices would come on stream (CLC/3/A [2.4.17]). There may well, indeed, be a significant oversupply by the time these offices come on stream (if ever they are actually built) (Lerner). This area contributes both to the City as a financial centre and London as a World City by means other than the provision of conventional office space (UDP[2.31] and SRDF [161] p40 CD 19.6)

18.The UDP (CD 20.1) singles out Smithfield as an area of special character. Policy ECON 6 has 3 requirements. It became apparent as the City was cross examining Mr Dodds that it had not really appreciated the nature of the first requirement. The first requirement is that the proportion of non B1 uses should be maintained. There is a clear and unambiguous conflict with that first requirement. There would be a vast increase in the proportion of B1 uses and corresponding reduction in the proportion of non B1 uses (see Polisano TPL/ 3/A [6.2.71].) The required proportion of non B1 could consist of many types of use such as housing, retail, restaurant,

entertainment, exhibition, hotel or clinic. The requirement is not surprising in view of the small scale nature of the office uses which characterise Smithfield. Large scale, 'grey day' (DHT) office uses are not consistent with Smithfield's character (UDP 2.34, p24 CD 20.1; ECON 10 and [2.44 line 5] CD 20.1); [2.5-8] p 2 EH/6/A; [161] p 40 SRDF CD 19.6) The London Plan emphasizes that maximization of the potential of areas should respect character, context and local distinctiveness (4B. 1,p172; 4B.3 p176; 4B.7 p180 CD 19.1)

19. The SRDF CD 19.6 (see esp A21-A23) is far from providing any justification for the scheme. The provision of employment does not imply large plate commercial office jobs. The area offers many varied types of employment at present. These can be increased. The increased activity which intensification implies would be achieved on this site by bringing the GMB and Annex back into use. The basement which it now appears is available for redevelopment itself provides great opportunities for greater amount and range of activity. There are other areas within the Afl which the LP and SRDF envisage for redevelopment, such as the airspace above the railway. The SRDF has a minimum figure for housing, but no such figure for offices. It seeks affordable housing within the Afl. None is provided; the sum of money offered would buy one small unit of housing in the area. A large amount of new office space has been permitted elsewhere in the Afl. There is no reason to suppose that the indicative figure will not be reached by 2026 without this scheme. Achievement of an area's potential necessarily involves an appreciation of, and respect for, its constraints. The SRDF recognizes that intensification is to be subject to environmental constraints. Architectural and townscape heritage is, it hardly needs saying, one of those constraints.

Prematurity:

20. The proposal is for a radical departure from the statutory development plan. Such a departure should be undertaken only after an amendment to the development plan has been through the processes necessary for such changes. (see MD 8.1-8.6 EH/6/A pp18-19)

23. This is especially important in a location such as this which is the gateway to Smithfield from the west and south. The scheme would complete the canyon walls of F St. It would close off perception of Smithfield both from F St and from the bridge on Holborn Viaduct.

Sustainability:

24. The London Plan (4B.6 p179 CD 19.1) requires that planning authorities should '*ensure*' that schemes of this kind should have '*the highest standards of sustainable design and construction*'. This means that such standards must be demonstrated before permission is given. Indeed this is a large scale scheme and therefore must adopt '*exemplary standards*' (4B.9 p182 CD 19.1).

25. This scheme fails both the test of 4B.6 and that of 4B.9. First it fails to reuse a building. Such reuse is expressly identified as a feature of sustainability in 4B.6 (1st indent). Second it fails to demonstrate either the conservation of energy or the making the '*most of natural systems*'. (4B.6 3rd indent)

26. EH would of course be failing in its statutory duty to seek to protect these historic buildings if it did not make submissions about the non compatibility of the replacement scheme with national and

local general sustainability policies. These matters are ones which it is the duty of the SoS to take into account, regardless of EH submissions, both as a matter of EC law under Article 10 EC and the EIA Directive 85/337/EEC as amended and under domestic law pursuant to s 38(6) P&CPA 2004. EH powers include those under the National Heritage Act 1983 s 33 (5)(d) for the purpose of exercising their functions' *to do such other things as the Commission think necessary or expedient*'. Appearance at an Inquiry and making submissions directed towards defeating a scheme which would damage or destroy historic buildings and Conservation Areas and their settings is within EH powers. The attempt to argue otherwise by Mr Katkowski reflects perhaps an underlying sense of desperation about the merits of his client's case.

27. The real significance of the fact that sustainability is not a prime concern of EH does not yet appear to have been appreciated by TPL. EH does not have the resources, and cannot be expected, to carry out an independent research exercise to assemble the data to identify and assess the likely significant environmental effects of the project associated with its energy use. It has to use the data being supplied in the ES.

28. I do not repeat here the submissions made in ?EH 9, EH10, EH11 and EH 14 about the nature of the EC EIA regime. Suffice it to say that an important element of it is that the burden of researching and assembling material about the environmental effects of a project is transferred to the promoter of the scheme. As Lord Steyn observed in *Burkett* [2002]UKHL23, [2002] 1WLR 1593

'The Directive seeks to redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual and community interests, about the environmental effects of such developments' [15] p 1599D

29. The data required by the EIA Directive is that

'required to identify and assess the main effects which the project is likely to have on the environment' (Article 5 (3))

The precautionary principle (Article 174 EC) must be applied in determining what is to be regarded as likely. An effect must be regarded as likely for the purpose of deciding whether it must be assessed unless it can be positively ruled out (Case C 127/02 *Waddensee* ECJ [42-44]). Data must therefore be supplied about effects which may well not be main so that a judgment can be made about whether they are.

30. The required data has not been provided. That should enable those interested first (a) to form a view about what environmental effects are likely and (b) then to decide whether they are good or bad and how significant they will be.

31 There are a number of features of this building scheme which suggests that it will be wasteful of energy and fail to harness natural systems. I give a few examples. It will be artificially lit not only at night but from dawn to dusk. It will have much heat generating electrical equipment. It will have large expanses of glass on the walls and roof. Yet it will have a huge covered atrium. This suggests that it is likely to require unnecessarily large quantities of energy for cooling because of unnecessary uptake of solar heat and inadequate use of natural cooling. The data to assess this has not been provided.

31. Mere generalized assertions about the sustainability of the building do not satisfy the requirements of the London Plan or the EIA Directive.

32. The ES is manifestly defective and fails to constitute an ES as defined in the Regulations or required by the Directive. The

information supplied to the Inquiry has been, and remains inconsistent and contradictory.

33. The one clear fact which emerged was that the promoters, including Mr Polisano, for all their fine talk about sustainable design, had no real interest in the subject and had not the first idea about whether this building harnessed the natural system of sunlight through PV cells or how it would otherwise generate power. Mr Polisano's written evidence said that 1700m² of PV would be provided, and that there would be CHP and trigeneration. (TPL/3/A 6.5.09, 6.5.14 pp139-140). Professor Tavernor actually drew on a plan (p 119) where he believed PV would be installed. This evidence was thus inconsistent with the original ES which said that they would not be provided (CD1.9 p 32 3rd para; p40 2nd para '.....*are not adopted into either building...*'). Thus the ES failed to comply with requirements of the Directive and Regulations.

34. Mr Katkowski repeated failed to assist the Inquiry on the simplest questions about energy use and generation. Eventually TPL 17 (see [4]) was provided to the Inquiry. This stated that PV would not be viable at 43 F St.

35. The Supplementary ES (TPL 18) presented to the public a different picture. It gave the impression that PV would be provided at 43 F St (see [46]). That is inconsistent with what the Inquiry has been told are the developer's intentions.

36. But most importantly the data necessary to assess energy sustainability has simply not yet been provided. This is implicitly recognized by the City which has sought to require it to be supplied at a later stage. One of the problems with this will be that these feasibility studies will follow, not precede, the grant of permission. Another will be that neither EH nor any other interested body will have a right to participate in the consideration at that stage. This is

inconsistent with the EIA Directive and Regulations. That is apparent from decisions such as *R v Cornwall ex p Hardy* [2001] Env LR 25 and *Smith* [2003] EWCA Civ 262 [25-28] and [33]. The Directive requires the information 'at the earliest stage', as was recognized by the ECJ both in case Case C 201/02 *Wells* ECJ [51-52] and Case C 290/03 *Barker* ECJ [47] HL [2006] UKHL 52 [2007] 1 AC 470 [1],[22-23], [34-36] . The method of transposition we have adopted does not permit the SoS to decide to defer this matter.

37. The information which has been left over for later determination is far from the final details of a generally acceptable system of energy generation. The fundamentals are simply not known. The reference to the City's document whose Section 1.4 incorporates a ?200 page study by consultants does not change this. This condition is far from referring to a well established, well understood tried, tested and trusted method of energy generation. Section 1.4 makes clear that its hallmark is complete freedom for the developer to do what he likes.

38. The references to BREEAM in the s 106 obligations do not advance matters. (see CD 1.9 pp 14-15) First BREEAM has its uses but many of its quantitative criteria relate to matters other than the quality of design in relation to energy efficiency and natural systems take up of the building (such as management systems, transport accessibility, and the previous use of the site). Second reference to BREEAM does not remedy the fundamental deficiency in data.

39 We simply do not know how much energy will be generated on site from renewable sources. We do not know what mode of generation the project will adopt. If biomass is adopted we do not know what would be the volumes and quantities of solids or liquids (and we have been told that is possible). We do not know what is the availability locally and from sustainable sources. We do not

know what emissions to air would be caused. We do not know where the fumes would be vented or what they might contain.

City Consideration:

40 Little weight can be attached to the City view

41The City should have used its ownership of the site to further their development plan policy objectives as required by IMP 1 (p204 CD 20.1). The UDP expressly states that

'The Corporation will, within the constraints of its other roles and duties, use its powers as landowner in support of the policies set out in this Plan' ([13.13] p 205 CD 20.1)

Sadly it has done the opposite.

41For many years it has sought to demolish and redevelop this site, as the GLC Conservation Area reports shows (EH/6/B MD App 1) . The shameful neglect of the WMBs over many years cannot be (hidden by recent efforts to disguise it). Dr Steedman agreed in XX that if the building had been properly maintained it would not now need the bulk of necessary repair work. This neglect and the flagrant disregard of national and local conservation policy by the City cannot be ignored.

42The secret report (Adam Wilkinon App BB SBH/5/C) is revealing. It reveals a determination to demolish at a time when the advice it had received suggested that reuse of the building was viable. Its officers' advice at the time it decided to contract with Thornfield was that the current value without demolition was £8.55M. [62]. If

£3M is taken from that (half the cost of the then estimate of the tunnel lid works (£6M) and therefore not attributable to the highway in West Poultry [7]) then the then current value without demolition, even paying for tunnel lids works, was £5.55M. It also reveals a desire to frustrate Government policy for the marketing of historic buildings before demolition.

43The Committee report for this application was inadequate and partial as Mr Dodds explained.

Special Circumstances Justifying Demolition

D: Community Benefits

Community benefits could only justify demolition if they were (a) substantial and (b) would not occur in the ordinary course of events. There are no such on offer here, as Mr Dodds explains at EH/6/A [9.2-9] and [11.8-12]. The City is obliged to maintain the lids (CLC/3/A [2.3.15]. The other 'benefits' upon which reliance is placed are no more than any development of this size and type would be expected to provide.

Engineering:

E: The Buildings above Ground:

There is no serious dispute about the above ground structures (EH/8/A [4.1-4.16]). They were considered to be fine in 2002 (SBH/5/C AW App BB [11 last sentence]. They suffer from neglect (TPL/4/A [2.3.4] and Dr Steedman XX'd and CLC/4/A [2.1.1] but

'There is, however, no case for the demolition of the above ground structures on structural grounds.' (EH/8/A [4.15])

F: The 'Tunnel' Lids:

1. Alarmist statements about the railway 'tunnel' lids have been used by the proponents of this development, Thornfield and the City, to justify demolition of the GMB and achieve their aspiration of a large floor plate 'predominantly commercial office building!'. This has always been a bold argument. The majority of the GMB is not above the railway; only a small proportion of the building is above the railway running tracks.
2. It is instructive to compare the statements made by TPL and the City about the lids at various stages with the position as finally established in the last week of evidence at the Inquiry when Network Rail appeared. Dr Steedman initially stated to the Inquiry that the lids were '*clearly unsafe*' (TPL/4/A [2.5.73] and when first XX'd). His failure to take the necessary steps to remedy what would have been a very serious situation revealed the insincerity of the evidence. Later he retracted the observation when XX'd by SAVE.. All the engineers eventually agreed that the lids are currently safe.
3. Network Rail, which has the statutory responsibility for rail infrastructure, gave clear and unambiguous evidence through CD 8.41 and Mr Mitchell, that the lids were currently safe. Naturally it would prefer brand new lids, but it saw no need to replace the lids for the Thameslink

project. The lids are of a similar age to many above the rail network. Indeed there are many similar structures between Blackfriars and St Pancras. Some would be in better condition; some would be in worse condition. This was far from an ill considered hasty view. Network Rail experts have been involved in lengthy preparations for the Thameslink Project for many years. They had received many months ago the February letter TPL 4 G from Mark Whitby on behalf of the developers soliciting support. They were given several weeks notice of the matters in which the Inquiry would be interested.

4. The method of construction of the 'tunnel' lids is the tried and tested method of C19 cotton mill floors (EH 8/D [7.1-4]). It is not surprising therefore that all the engineers who have given evidence agree that the lids could be repaired. This is, of course, subject to the availability of both sufficient time and money.
5. Several different methods of repair might be adopted alone or in combination. Conventional techniques alone could be used (EH 8/D [9.1]). Another method is that of a new suspended support system. Originally that was Mr Morton's preferred recommendation. It remains an option should the SoS not agree with him that other methods would be the most appropriate (EH8/S [1.2]). Mr Morton, after seeing the Finite Element Analysis (CD 5.15), produced in the month before the Inquiry after exchange of evidence, came to the conclusion that a NSSS was not necessary.

6. Even if the SoS were of the view that the lids had to be replaced, rather than repaired, over the railway it would still be possible to adopt a scheme of only partial demolition along the lines of 2D and 2E (EH 8C (BAM 20-29) and EH 8D). Mr Morton's consideration of that was not, of course, an indication that *he* accepted that any demolition was necessary (EH/8/D [4] and EH/8/S [5.1]).

7. The subsurface structure has generally been divided into 5 areas A-E. Many studies have been carried out by engineers over recent years. The worst areas have been opened up. I deal with A and D below. Area B merely requires inspection and possibly modest works (CLC/4/B Table B and CLC/4/A [7.1.4]-[7.1.6])) About Area C no concern has been expressed. No major areas of repair in Area E have been suggested in the various reports prepared.

8. Areas A and D over the railway running lines are the main ones of concern .

9. It is instructive to consider the report prepared by Alan Baxter Associates *for the applicants* in 2004 (CD5.11). No explanation has been offered as to why they are no longer engaged on the project. Dr Steedman when XX'd disagreed with very few of the report's observations in Section 3 on the condition of the existing structures and none in Section 4 on the assessments of load carrying capacity. Alan Baxter's overall conclusions were summarized on page 2 as follows

'....provided that local repair works were carried out, as well as continuing maintenance and other repairs in the future, the structures would be capable of continuing to support the loads currently applied to them.'

It is clear both from the Summary on page 2 and the conclusions on p 12 that it was only

' to achieve the investor and other stakeholder criteria, as set out by the investment advisers, regarding perceived risk of future disruption due to maintenance of the railway decks....'

that they were unable to recommend repair and strengthening which they discussed at p 10 [5.1]-[5.5]. That conclusion was inevitable as the investment advisers, including Robert Peto of DTZ, made in their investment criteria advice this clear and unambiguous statement

' 4.5 Repair of the existing railway deck would not satisfy the criteria to create an institutional investment'
(Appendix B p 26)

10. The Finite Element Analysis examined Area A WP-1. This area is under West Poultry. Area A-WP1 was chosen for analysis because it was a worst case (CD 5.15 p 13 [19]). BRE found that

' Even if the bottom flanges of all single webbed girders are ineffective,, and the brick arches are only partially effective in transferring loads directly to the supports , it is unlikely that the girders will fail under the 10kN/m2 load.....

'It is concluded that, at present the deck slab.... is unlikely to fail under self weight and an imposed load of up to 10kN/m2' (CD 5 15 Exec Summary)

The 10kN/m2 loading encompasses *' high emergency vehicle loading throughout'.*

11. Mr Morton does not suggest that this report should be viewed in isolation or that it obviates the need for further examination and the execution of any necessary repairs and strengthening. But it provides strong support for his approach to the structure.
12. Mr Morton is an enormously experienced hands on engineer. His strength is not in creative forensic wordplay but in actually doing engineering works to save historic buildings. His background and experience (EH 8A [1.1-8] EH8B BAM1]) should command respect.
13. Sir Terry Farrell's observations when XX'd by CK were instructive. As he observed, as an architect he has had responsibility for large projects involving engineers. He had read the engineering evidence. He was in a position to form a view on the need or otherwise to replace the lids. His view was that it was not.
14. Mr Dodds demonstrated a considerable awareness of the engineering issues. As a planner he had to form views on

these matters. He wrote EH/6/C after hearing the engineering evidence. He was unconvinced by the engineering arguments of promoters of the scheme.

15. Both of the former are in the same position as an Inspector or the SoS. They are not engineers but have to make judgments about engineering matters. Their support for retention should carry weight.

16. Experience at Billingsgate and elsewhere shows how dangerous it is to accept at face value the engineering arguments put forward by the promoters of development projects anxious to remove inconvenient bits of heritage.

17. The engineers engaged by the owners and developers have sought to examine the place that they consider to be the worst. Many investigations have taken place. It is however noteworthy that Dr Matthews for the City identified only a small number of girders which he considered required substantial work (CLC/4/A [7.16], CLC/4/B Table 2 and see especially Figure G5 p 187 as amended in oral evidence). He himself observed

'Thus the evolving investigative approach to remedial works.....can deliver the final result in difficult and unclear circumstances...' (CLC/4/A [7.5.9])

'Thameslink Window of Opportunity'

18. Late on in the promotion of the scheme, after the resolution to grant permission by the City, a new argument emerged. This is the 'Thameslink Window of Opportunity' ('TWOO') argument. Suddenly it was suggested that the GMB had to be demolished so that necessary works should not take place after the TWOO had closed in 2009 once OH electrification had been extended at Snow Hill to City Thameslink. Thus for example the City in opening said

'....by the end of 2009 the planned access to this route will be limited to a period of four hours on a Saturday night'
[CLC/2 [23]]

' Current indications ...from Network Rail is that if the window of opportunity which exists prior to autumn 2009 is not taken advantage of, there will be virtually no ability to undertake any form of substantial works to improve the condition of the Smithfield deck structures until after 2015....' (Dr Matthews CLC/4/A [8.3.1])

19. English Heritage discovered the true position from Network Rail at a meeting on 2nd November (EH/8/J). It was very different from that represented to the Inquiry by the promoters of this scheme. In reality from January 2009 until the end of 2011 there will be nightly possessions of 6 hours every day of the week and further longer periods of substantial possession. These Thameslink (CD 8.41 [5.3]) possessions exceed 5,000 hours (Mitchell oral). As Mr Mitchell explained these are largely for station works and NR is willing to be flexible to enable lid works to be undertaken alongside its works .Even making allowances for set up and close down of works (1/2 hour per

possession and time for de and rewiring at all possessions (which would not in fact be necessary) there would be well over 4,000 hours of possessions regardless of lid works. These would include 5 long (Easter/Christmas) breaks.

20. Works can be carried out in more than one area at a time. The estimates of required time for repair rather than replacement vary from under 500 hours (Mr Morton EH 8/A [9.17]) for the NSSS to a minimum of 2019 hours (Dr Matthews CLC /4/A [7.5.16 and 23] and CLC/4/B Figures G6 and G7 pp 188/9 later slightly reduced in CLC/4/E and F). It is noteworthy that even on extreme assumptions as to additional defects to be discovered during works, requiring 100% bottom flange integrity bolting, Dr Matthews considered that works in Areas A and D could be completed within 14 months (CLC 4/A [7.5.19] and [7.5.25]).

Dr Matthews overall conclusions were no more than that

' Depending on what transpired there is a risk that [necessary girder replacement works] might extend the period required for remedial works to the end of August 2009 or beyond'

OHL and Propping:

21. The amount of time needed for de and rewiring could be reduced by continuing to transfer from OHL to 3rd rail at Farringdon rather than City Thameslink for the whole or part of 2010/2011. A crash deck or propping could be left in place between possessions. The reason for moving that

to the south is because of difficulties in detraining people at Faringdon when there is a failure. That failure only happens 'once or twice a year in both directions'. On the rare occasions when it does happen it is possible to reduce pressure at Faringdon (if this rare occurrence coincides with busy periods), by sending Underground trains through Faringdon without stopping. The next station inbound is the very station at which failed trains have in the past used for detraining in those situations. This is, of course, inconvenient to affected passengers. But it hardly a reason justifying the demolition of the GMB.

22. Much of the GMB and Annex would not be affected by the OHL. Many areas are not over rail lines at all. The sidings are not going to have OHL. This would make it possible to leave in place any propping and crash decks during times when a train was stabled there or shunted there during system malfunctions.(CALC)

23. Even where there are OHL there is much that could be done, by way, for example, of examination and non propping work, during the 5 ½ hour periods of effective possessions once the power was off. For the most part propping is unlikely to be necessary. Dr Matthews must, of course, have taken account of the potential need for propping in his calculation of hours for necessary remedial work. That need, as he sees it, is already included in his estimates.

24. Even in the extremely unlikely event that the extent of repair found to be necessary upon further examination were to require greater periods of time then further time

could be made available by increasing the number of full weekends by 30 each year, closing for part of August in one or more years, or including Christmas 2011. Increasing the number of full weekends by 30 could add 1500 hours each year of 54 hour possessions (Sat/Sun 48 hours plus 6 hours Fri/Mon). The use of Christmas 2011 or parts of August 2010 or 2011 would enable long periods of possession uninterrupted by the need to demount any necessary propping. Recent concerns about holiday closures have not been directed against necessary engineering works but rather the total closure of the system even in the absence of the need for engineering works and the failure to ensure that the necessary staff were available for the planned engineering tasks.

25. There is no reason why the City should not already be planning for the contingency that it fails at this Inquiry. It certainly should not gain any advantage from failing to make such contingency plans. That would set a dangerous precedent. If the concerns expressed about the need to do something to the lids and the public interest in the speedy completion of any necessary works within the TWOO were sincere then it would already be making such plans. Insofar as it is not making such plans then the insincerity of its position at the Inquiry is apparent.
26. Even if however (a) the SoS considered it reasonable for the City to do nothing until the outcome of the Inquiry were known in June 2008 and (b) Dr Matthews excessively pessimistic estimate of the time for appointing engineers and contractors and getting started were to be accepted

there would still be ample time for the carrying out of necessary works. Possessions are already in place for Thameslink Project; these do not need to be arranged. NR will cooperate to speed up completion of the lid works.

]

27. The City has a right to such possessions as it needs for maintenance of the lids both under the relevant statutes (CD 29.3, CD29.2) and under the agreement of 1880 (CLC 9)

'The Corporation shall construct the floor at their own expense .And shall at all times thereafter maintain and keep the same in good repair and condition and for that purpose shall have at all times hereafter power to enter upon the lands of the railway company as often as shall be necessary' (CLC/9 (Clause 5))

28. NR lawyers would, as a matter of ordinary prudence, have included provisions reflecting this right in the NR contractual arrangements with the TOCs. The City right applies to repair and maintenance. The statutory price is £50 per hour (=£1200 per day). (It does, of course, not apply to removal and replacement for the purpose of redevelopment. Insofar as there is a TWOO it applies only to the desire of TPL and the City to replace the lids for redevelopment with a large office building.

29. In any event, even if there were not such a right to carry out maintenance, Network Rail would have every incentive to cooperate, as would the TOCs, in ensuring that any necessary possessions were made available before the end of 2011. In the unlikely event that they were not prepared to cooperate the Rail Regulator, as ultimate guardian of the public interest, would ensure that necessary possessions were provided. Many possessions are already programmed. There are 4 years before the end of 2011. There is therefore ample opportunity to provide notice to the travelling public.

30. Lest it be suggested that the City could not do the works because of its lease to Thornfield I observe that the City also has a right under the Interim Site Lease with Thornfield to enter to carry out its obligations in respect of the railway lids (CD 7.5 Annex F [3.4.3])

Fire Risk

31. This amounts to no more than an assertion that as there will in the future be more trains and passengers the risk from the existing state of fire protection will affect more people. There is no substance to this argument. First the calculations are highly theoretical and assume the type of train and traffic found throughout the UK rail system, rather than the Thameslink specific trains. Second there has been no attempt to balance this calculated risk against the risks of the KPF demolition over a busy passenger railway. Third there is no reason why the application of gunnite or other fire protection measures cannot be undertaken as part of a programme of repairs. That is what

Mr Morton proposes. Fourth, not surprisingly, Network Rail do not have this concern.

Future Maintenance

32.The need for maintenance on the Thameslink line will not suddenly come to an end in 2010 or 2012. Network Rail has never considered it necessary to replace all C19 structures with new ones for the Thameslink Project. There will remain many structures of that era above it between Snow Hill and St Pancras. Possessions will therefore be needed from time to time for necessary works on the line generally and in this area in particular. Any hoped for reduction in maintenance on this section cannot justify demolition of historic buildings. No doubt in the future Network Rail will try to coordinate work so that possessions for the lids here coincides with possessions necessary for other purposes elsewhere on the line.

West Poultry

33.West Poultry has been closed for several years. The market has continued to operate successfully. No reports to Council or other documents have been produced suggesting otherwise. Any advantage in strengthening it to take the heaviest goods vehicles cannot justify a decision to replace the lids. Indeed Mr Morton's NSSS would in fact take such loads. The City could pay for any extra expense associated with strengthening this highway structure from its on street parking surplus. That

fluctuates of course but it reaches amounts as large as £24M (SBH/5/C App BB [69(ii)]. In 2002 finding projects on which to spend that was seen as a problem.

Greater TWOO Risks with KPF2

34. If the true position had been as the promoters represented it then their own demolition and replacement scheme would have been more likely to fall foul of the closing of the TWOO. There was a remarkable contrast between the enthusiasm of the promoters for detail about repair options (eg CLC/4/E) and the absence of knowledge about time critical elements of the KPF2 scheme. The extent of their possession planning for tunnel lid replacement was limited, it transpired after XX, to TPL/4/H. They were unable to give more details about key matters than those set out in the Hochtief proposals of July 2007 CD 5.12. That noted many uncertainties about time sensitive tasks such as :

'Construction details for the strengthening of, or reconstruction of the new, deck abutment supports are not yet knownno details exist for the abutments within the rail section...'(2.3)

' Deck Construction: details for the deck are also not available at this stage' (2.4)

'At this stage the design of the pile and therefore the depth and diameter are unknown...'

As part of the design process site investigations may be required to establish ground conditions and determine the presence of any obstructions...'

The number of piles in the scheme is unknown...' (Work Package A1 p3 of 8)

35. There is, of course, a serious problem for the promoters in that the viability of the development is highly dubious as previously explained. It was only just viable on their analysis in June 2007 and then only if TPL had a 60% prelet and without allowing for any City ground rent. (Kut TPL/5/A [9.26], [8.36]-[8.40] and XX). Mr Kut described the prospect of a pre let in these terms

'In practice it is highly unlikely that this would be achievable....'

36. It would be unrealistic therefore to suppose that TPL would be in a position to decide immediately to go ahead with the present scheme in June 2008. Even if it were acceptable to propose replacement of the lids without the assurance of an acceptable replacement building redevelopment scheme for the site there is no reasons to suppose that TPL would in fact undertake such expensive works (in excess of £20M) without permission for a viable scheme.

37. The promoters seek to get round this problem by proffering an agreement. No agreement to do the lid works would in practice be enforceable (a) within the TWOO (delay -as the City sought to persuade, then considered legal action, then in

getting the matter heard by the courts, then on appeal, then contempt proceedings) (b) at all. What court would send TPL directors to prison for failing to make the company do what it did not have the money to do? If it would not, it could hardly contemplate an injunction (*South Buckinghamshire v Porter* [2003] UKHL 26 [18],[20],[32],[53],[77],[103]ⁱⁱ).

38. There are additional potential problems for the KPF scheme. NR might decide to seek a ransom for permitting the replacement of the lids which is a necessary prerequisite for the redevelopment. There is as yet no agreement in place between them. Mr Mitchell said that NR would take a commercial view of any potential ransom. It is unlikely that NR will not consider the potential in the light of all the material which has emerged at the Inquiry. N R Inquiry lawyers did not seem to have even seen the Agreement from which the ransom potential emerges.

G: Conditions and Planning Obligation Agreements

1. EH seeks, in respect of this and other matters, so far as possible to avoid repetition of what others have said. Nor does it propose to repeat the observations which it has already made orally and in EH 17, 18 and 19. Suffice it to say that neither do the proposed conditions and the proposed agreement have satisfactory objectives nor do they provide realistically enforceable obligations to achieve their purported objectives.

2. The recent amendments to the proposed agreement offer no comfort. 'Reasonable endeavours' is replaced by 'best endeavours' but they are to be subject to the limitations of what is '*in all the circumstances... reasonable*' and what is '*commercially prudent*'. First: The retention of the '*reasonableness*' limitation effectively degrades the reference to best endeavours to one of reasonable endeavours. Second: The objection to which this obligation is directed is that it is quite likely that it would not be commercially prudent or in all the circumstances reasonable to undertake these works. The limitation defeats the purported, ostensible purpose of the clause. Third: Schedule 1.2.2 is expressly subject to the limitation of a 60% prelet.

3. It is immaterial whether '*best endeavours*' would, or would not, normally include a limitation to what is '*commercially prudent*'. Whether the limitations herein come from express words or by legal inference an obligation subject to such limitations is not fit for its intended purpose. If the applicants have been advised that such limitations would be inferred by law it is surprising that they have chosen to include what they would *ex hypothesi* regard as redundant qualifications. *IBM v Rockware* deals with different wording for different purposes.

4. The amendments in respect of energy sustainability do not alter the fundamental problem. Planning permission for the scheme will have been granted before the data necessary to assess these matters have been supplied. Neither EH nor any other interested member of the public will have any right to participate in the later decisions on the deferred matters.

5. The data is relevant to this stage of the decision making process. A different scheme in respect of non deferred matters might well achieve better results than those that emerge from the feasibility studies. But it will be too late to require the necessary changes once this full permission has been granted. There will be no independent scrutiny. This is all the more important in this case as (1) the City is landowner as well as planning authority (2) has shown a determination to demolish (3) has neglected the buildings in breach of national and local policies for historic buildings and (4) has acted secretly in collusion with the applicant. Such circumstances are additional to the general doubts about the acceptability of the practice of remitting to local authorities determination of deferred matters (*Smith* [2003] EWCA Civ 262 Sedley LJ at [58-59]).

6. For the avoidance of doubt, however, I emphasise that EH regards the suggestion that the GMB should be wholly and the Annex substantially demolished before secure arrangements are in place to construct acceptable replacements as unacceptable. The proposal of the City that demolition should be linked to acceptable proposals and secure arrangements merely for the lid works would be inconsistent with PPG 15 and unacceptable even if those arrangements were (which EH does not accept) secure. The City's suggestion in opening of demolition without permission for KPF2 is, in any event, hardly consistent with Clause 3.1 of the draft agreement.

H:Conclusions

1. These applications are an attempt by the applicant and the City to drive a bulldozer preceded by a ball and chain through national and local heritage policies. This decision will be a test of the Government's commitment to its heritage policies and a development plan led system of planning. It will also be a test of its commitment to participatory decision making. It will also be a test of its vision. It raises the question of whether the City is in effect, in the belief of which it appears to have acted, a plan free office zone. It is a decision which will be closely watched by landowners and developers. They will not view consents as unique but as a precedent.

2. If a well funded landowner with a substantial local estate such as the City of London can, with impunity, flagrantly flout national and local policies then local authorities throughout the kingdom, most of whom are subject to far greater financial pressure, will seek to do the same. Developers will seek to make

secret agreements of this kind. Landowners will neglect historic buildings in the hope of enjoying similar benefits.

3. There is a great opportunity for regeneration of the kind successfully undertaken in Covent Garden, Spitalfields, Greenwich and Camden Lock. The promoters wish to throw away both our heritage and that opportunity.

4. If the sought consents and permissions were granted respect for the planning system would be diminished. Economic vitality would be eroded. Quality of life would be damaged.

5. There are times when firm decisions must be made. This is one of them.

ROBERT McCracken QC
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24th January 2008

ⁱ Polisano 'primarilydesigned as a commercial office building' TPL/3/A [6.2.71]

ⁱⁱ South Buckinghamshire v Porter